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Bukit Kretam Sdn Bhd v Ibig @ David bin Rampas

B HIGH COURT (KOTA KINABALU) — ORIGINATING SUMMONS NO BKI-24NCvC-12/2 OF 2021
WONG SIONG TUNG JC
22 MARCH 2021

C *Land Law — Ownership — Claim for — Respondent applied for replacement and certified copies of documents of title for parcels of land — Deputy director ordered appellant to deliver title documents to respondent — Appeal against order and decision — Whether replacement and certified copies of documents of title should be issued to respondent — Whether respondent was legal custodian of*
D *documents of title — Land Ordinance (Sabah Cap 68) ss 41, 120 & 121*

This was an appeal by the appellant under s 41 of the Land Ordinance (Sabah Cap 68) ('the Land Ordinance') against the decision and order of the deputy director following an application made by the respondent under s 120 of the
E Land Ordinance. The appellant had been in possession and holding the documents of title for 13 parcels of land. The registered owners of the 13 parcels of land concerned had failed in their actions to set aside their sale of these 13 parcels of land to one Brinchang Farms Sdn Bhd who subsequently sold the same to the appellant. The respondent as the attorney of these
F registered owners had also failed in his application for judicial review to prevent Director of Lands and Surveys Department in delivering the title documents for the 13 parcels of land concerned to the appellant. The respondent then claimed as the purchaser of the 13 parcels of land concerned as well as the holder of a power of attorney granted by these registered owners applied to the
G assistant collector of Land Revenue of the Land Office of the District of Kinabatangan under s 120 of the Land Ordinance for replacement and certified copies of the documents of title for the 13 parcels of land to be issued to him. The appellant had undoubtedly objected to the respondent application before the deputy director of the Lands and Surveys Department. The deputy
H director decided that he could not issue such a certified title documents for the 13 parcels of the land to the respondent as these title documents were not lost or destroyed as admitted by the respondent in the inquiry before the deputy director. However, the deputy director nevertheless further decided that the respondent was the lawful custodian of the 13 documents of title concerned
I and that the appellant was not the lawful and rightful party entitled to the custody of and to retain the same and proceed to order the appellant to deliver the 13 title documents concerned to the respondent within 14 days failing which the respondent was at liberty to make application under s 121 of the Land Ordinance. Hence, this appeal.

Held, allowing the appeal:

(1) The matter before the deputy director by the application of the respondent was not concerning cancellation, rectification or correction authorised to be made to the register under s 121 of the Land Ordinance in respect of the 13 documents of title but an application under s 120 for replacement or issuance of certified documents of title because they were said to be lost or destroyed. Section 121 could not be invoked in an application by the respondent under s 120 of the Land Ordinance so as to enable the deputy director to assume the power to adjudicate on the conflicting claims between the respondent and appellant to the right to the custody and possession of or to hold the 13 documents of the title or the legal custodian thereof and to assume the power to order the delivery of the documents of title to the party which the deputy director thought to be legally entitled to hold the same solely based on the materials before him in the application, when the undisputed evidence is that these documents of title were not lost or destroyed at all. Further, s 121 of the Land Ordinance only empowered the deputy director to issue notice to require the title documents to be delivered up to the deputy director himself for the purposes as stated thereunder and not to order the title documents of the land to be delivered by the holder to some other persons between whom the deputy director purportedly determined the issues of their disputes. There was no provision in the Land Ordinance which empowered or gave the deputy director the jurisdiction or powers to adjudicate on the conflicting claims between parties to the legal right to the custody or possession of or to hold the title documents to land. When there was objection to the application thereunder by reasons of conflicting claims of another party to the legal right to custody or possession or to hold the document of title, it was also wrong in law for the deputy director to adjudicate as to which party had a better legal right of possessions or custody thereto when it was not demonstrably plain and obvious that the applicant was legally or lawfully entitled thereto. Having found that the documents of title was not lost or destroyed upon the application in an inquiry under s 120 of the Land Ordinance, the deputy director ought to have dismissed the respondent's application in view of the objection by the appellant (see paras 21–23, 25 & 30–31).

(2) The deputy director erred in law in proceeding further in adjudicating that the respondent was the legal custodian of the documents of the title concerned and not the appellant. It was wrong in law for the deputy director to assume the power under s 121 of the Land Ordinance in the application before him under s 120 of the Land Ordinance and to further order the appellant to deliver the documents of title concerned to the respondent (see paras 32–33).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu berdasarkan s 41 Ordinan Tanah (Sabah Bab 68) ('Ordinan Tanah') terhadap keputusan dan perintah timbalan pengarah berikutan permohonan yang dibuat oleh responden di bawah s 120 Ordinan Tanah. Perayu telah memiliki dan memegang dokumen hakmilik untuk 13 bidang tanah. Pemilik berdaftar 13 bidang tanah tersebut gagal dalam tindakan mereka untuk mengetepikan penjualan 13 bidang tanah tersebut kepada satu Brinchang Farms Sdn Bhd yang kemudian menjualnya kepada perayu. Responden sebagai peguam pemilik berdaftar ini juga gagal dalam permohonannya untuk semakan kehakiman untuk mencegah Pengarah Jabatan Tanah dan Ukur menyampaikan dokumen hakmilik untuk 13 bidang tanah tersebut kepada perayu. Responden kemudian memohon sebagai pembeli 13 bidang tanah yang berkaitan dan juga sebagai pemegang surat kuasa wakil yang diberikan oleh pemilik berdaftar ini memohon kepada penolong pemungut Hasil Tanah Pejabat Tanah Daerah Kinabatangan di bawah s 120 Ordinan Tanah untuk penggantian dan salinan dokumen hakmilik yang diperakui untuk 13 bidang tanah untuk diserahkan kepadanya. Perayu tidak diragukan lagi membantah permohonan responden di hadapan timbalan pengarah Jabatan Tanah dan Ukur. Timbalan pengarah memutuskan bahawa beliau tidak dapat menyerahkan dokumen hakmilik yang diperakui untuk 13 bidang tanah tersebut kepada responden kerana dokumen hakmilik ini tidak hilang atau musnah sebagaimana yang diakui oleh responden dalam siasatan di hadapan timbalan pengarah. Walau bagaimanapun, timbalan pengarah selanjutnya memutuskan bahawa responden adalah penjaga sah 13 dokumen hakmilik berkenaan dan bahawa perayu bukanlah pihak sah yang berhak mendapat hak penjagaan dan untuk mengekalkannya dan terus memerintahkan perayu untuk menyerahkan 13 dokumen hakmilik yang berkenaan kepada responden dalam masa 14 hari jika gagal responden bebas untuk membuat permohonan di bawah s 121 Ordinan Tanah. Oleh itu, rayuan ini.

Diputuskan, membenarkan rayuan:

(1) Perkara di hadapan timbalan pengarah dengan permohonan responden bukan mengenai pembatalan atau pembetulan yang dibenarkan untuk dibuat ke pendaftaran di bawah s 121 Ordinan Tanah sehubungan dengan 13 dokumen hakmilik tetapi satu permohonan di bawah s 120 untuk penggantian atau pengeluaran dokumen hakmilik yang diperakui kerana dikatakan hilang atau musnah. Seksyen 121 tidak dapat dibangkitkan dalam permohonan oleh responden di bawah s 120 Ordinan Tanah untuk membolehkan timbalan pengarah untuk mengambil alih kuasa untuk mengadili tuntutan-tuntutan yang bertentangan antara responden dan perayu terhadap hak atas penjagaan dan pemilikan atau pegangan 13 dokumen hakmilik atau penjaga sah dan untuk mengambil alih kuasa untuk memerintahkan penyerahan

dokumen hakmilik itu kepada pihak yang dianggap oleh timbalan pengarah untuk memegangnya secara sah hanya berdasarkan material dihadapannya dalam permohonan itu, apabila keterangan yang tidak dapat dipertikaikan adalah bahawa dokumen hakmilik ini sama sekali tidak hilang atau musnah. Selanjutnya, s 121 Ordinan Tanah hanya memberi kuasa kepada timbalan pengarah untuk mengeluarkan notis untuk meminta dokumen hakmilik disampaikan kepada timbalan pengarah sendiri untuk tujuan seperti yang dinyatakan di bawahnya dan bukan untuk memerintahkan agar dokumen hakmilik tanah tersebut diserahkan oleh pemegang kepada beberapa orang lain di mana timbalan pengarah dikatakan menentukan isu-isu pertikaian mereka. Tidak ada peruntukan dalam Ordinan Tanah yang memberi kuasa atau memberi timbalan pengarah bidang kuasa atau kuasa kepada timbalan pengarah untuk mengadili tuntutan yang bertentangan antara pihak-pihak yang memiliki hak undang-undang atas hak penjagaan atau pemilikan atau pegangan dokumen hakmilik tanah. Ketika terdapat bantahan atas permohonan di bawahnya dengan alasan tuntutan yang bertentangan dari pihak lain terhadap hak undang-undang untuk menjaga atau memiliki atau memegang dokumen hakmilik, juga salah dalam undang-undang bagi timbalan pengarah untuk memutuskan pihak mana yang memiliki hak undang-undang yang lebih baik mengenai hak milikan atau penjagaan apabila adalah tidak jelas dan nyata bahawa pemohon berhak secara sah atau undang-undang. Setelah mendapati bahawa dokumen hakmilik tidak hilang atau musnah semasa permohonan dalam siasatan di bawah s 120 Ordinan Tanah, timbalan pengarah seharusnya menolak permohonan responden memandangkan bantahan oleh perayu (lihat perenggan 21–23, 25 & 30–31).

(2) Timbalan pengarah terkhilaf dalam undang-undang dengan meneruskan dalam memutuskan bahawa responden adalah penjaga sah dokumen hakmilik berkaitan dan bukan perayu. Adalah salah dalam undang-undang untuk timbalan pengarah untuk mengambil alih kuasa di bawah s 121 Ordinan Tanah dalam permohonan di hadapannya di bawah s 120 Ordinan Tanah dan untuk memerintahkan lebih lanjut perayu untuk menyerahkan dokumen hakmilik berkaitan kepada responden (lihat perenggan 32–33).]

Cases referred to

Duthie v District Land Registrar At Wellington (1911) 31 NZLR 245, SC (refd)
Heller v British Columbia (Registrar Land Registration District Vancouver) [1963] SCR 229, SC (refd)
Macarthy and Collins, In re (1901) 19 NZLR 545, SC (refd)
Manahi Te Hiakai v District Land Registrar (1909) 29 NZLR 130, SC (refd)

Legislation referred to

Land Ordinance (Cap 68) ss 4, 38, 41, 41(1), 47(3), 49(2), 68, 117, 118, 120, 121, 121(1), 147
Land Registry Act [CN] s 256
Land Transfer Act 1885 [NZ] s 69
Land Transfer Act 1908 [NZ]

Marina Tiu (Carl Malanjum with her) (Yap Chin & Tiu) for the appellant.
Victor Chong (Poh & Victor Chong) for the respondent.

Wong Siong Tung JC:

[1] This is an appeal (encl 1) by the appellant under s 41 of the Land Ordinance (Sabah Cap 68) against the decision and order of the deputy director made on 19 January 2021 in *Siasatan Tanah Pengarah (Pindah Kes) No 39 Tahun 2020* following an application made by the respondent under s 120 of the Land Ordinance (Sabah Cap 68).

[2] The appellant have been in possession and holding the documents of title for 13 parcels of land following:

(a) Kinabatangan Country Lease No 095313769;
(b) Kinabatangan Country Lease No 095313778;
(c) Kinabatangan Country Lease No 095313812;
(d) Kinabatangan Country Lease No 095313910;
(e) Kinabatangan Country Lease No 095313796;
(f) Kinabatangan Country Lease No 095313803;
(g) Kinabatangan Country Lease No 095313929;
(h) Kinabatangan Country Lease No 095313938;
(i) Kinabatangan Country Lease No 095313947;
(j) Kinabatangan Country Lease No 095313965;
(k) Kinabatangan Country Lease No 095313956;
(l) Kinabatangan Country Lease No 095313787; and
(m) Kinabatangan Country Lease No 095313974.

[3] The registered owners of the 13 parcels of land concerned, having failed in their actions in High Court Suits No S 22–03 of 1998 and S 23–06 of 1998 to set aside their sale of these 13 parcels of land to one Brinchang Farms Sdn Bhd and who subsequently sold the same to the appellant and the respondent

as the attorney of these registered owners having also failed in his application for judicial review in Judicial Review No K25–24 of 2007 to prevent director of Lands and Surveys Department in delivering the title documents for the 13 parcels of land concerned to the Messrs Yap Chin & Tiu, advocates acting for the appellant, on or about 3 January 2020, the respondent then claiming as the purchaser of the 13 parcels of land concerned as well as the holder of a power of attorney granted by these registered owners applied to the assistant collector of Land Revenue of the Land Office of the District of Kinabatangan under s 120 of the Land Ordinance for replacement and certified copies of the documents of title for the 13 parcels of land to be issued to him.

[4] Section 120 of the Land Ordinance (Cap 68) provides that:

> 120 Loss of title
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> (1) If any document of title is lost or destroyed *the person lawfully entitled to the custody* thereof together with other persons, if any, having knowledge of the circumstances may file in the Land Office of the district in which the land is situated an affidavit or statutory declaration containing a full description of such document of title and the circumstances under which it was lost or destroyed.
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> (2) The Collector shall thereupon cause to be published in the Gazette or locally in the district, for the period of not less than one or more than three months a notice in the form of Schedule XXIV.
>
> (3) *If no objection is lodged within the period stated*, the Collector shall thereafter, on receipt of the prescribed fees, *issue to the person lawfully entitled to the custody thereof a certified copy of the document of title*, and such certified copy shall be available for all purposes and uses for which the original title so lost or destroyed would have been available, and as valid to all intents as such title:
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> *Provided that the Collector shall not in any case issue such certified copy unless he is satisfied as to the truth of the affidavit or declaration and the good faith of the applicant for the same*. (Emphasis added.)

[5] The appellant has undoubtedly objected to the respondent application before the deputy director of the Lands and Surveys Department.

[6] On 19 January 2021, the deputy director of the Lands and Surveys Department decided that he could not issue such a certified title documents for the 13 parcels of the land to the respondent as these title documents were not lost or destroyed as admitted by the respondent in the inquiry before the deputy director.

[7] However, the deputy director nevertheless further decided that the respondent was the lawful custodian of the 13 documents of title concerned and that the appellant was not the lawful and rightful party entitled to the custody of and to retain the same and proceed to order the appellant to deliver

the 13 title documents concerned to the respondent within 14 days failing which the respondent is at liberty to make application under s 121 of the Land Ordinance (Cap 68). The decision and order of the deputy director is set out as follows:

> Perintah.
>
> Memandangkan dokumen asal 13 geran tersebut tidak hilang maka saya tidak boleh membuat perintah untuk mengeluarkan dokumen gantian baru yang sah bagi 13 geran tersebut. Walau bagaimanapun, memandangkan kaunsel responden gagal membuktikan kepada saya bahawa responden merupakan penyimpan yang sah dokumen 13 geran tersebut maka saya perintahkan responden menyerahkan dokumen asal 13 geran tersebut kepada pemohon dalam tempoh 14 hari berkerja dari tarikh perintah ini diterima dan jika gagal, pemohon berkebebasan untuk memohon di bawah seksyen 121 Ordinan Tanah (Sabah, Bab 68).

[8] Thus, the appellant appealed under s 41(1) of the Land Ordinance (Cap 68) against the said decision and order of the deputy director.

[9] It is unclear what the deputy director of the Lands and Surveys Department meant precisely when he ordered that 'pemohon berkebebasan untuk memohon di bawah s 121 Ordinan Tanah (Sabah, Bab 68)' which is contradictory to the early part of his decision when he had ordered the appellant to deliver the 13 title documents concerned to the respondent (*saya perintahkan responden menyerahkan dokumen asal 13 geran tersebut kepada pemohon dalam tempoh 14 hari berkerja dari tarikh perintah ini diterima*).

[10] It is to be noted that the inquiry was not even for delivery up of the documents of title for correction or rectification.

[11] The matter for inquiry before the deputy director by the respondent's application under s 120 was whether the documents of title for the 13 parcels of land were lost or destroy to determine whether the replacement and certified copies thereof should be issued, to the respondent, the applicant who claimed to be legally entitled to the custody thereof.

[12] Though in an application under s 120 of the Land Ordinance (Cap 68), the applicant has to satisfy the deputy director not only that the document of title was lost or destroyed but also that he/she was 'lawfully entitled to the custody' to be issued with the replacement and certified documents of title.

[13] It is true that an owner of a parcel land is entitled to be issued the document of title thereto as may be provided under the Land Ordinance (Sabah Cap 68) and he is also prima facie entitled to its custody or possession or to hold the same. However, an owner's right to the custody and possession to

or to hold the document of title may be lost to another party by dealings and for variety of reasons. A

[14] For example, the landowner may enter into agreement with another whereby the right of custody and possession to or to hold the document of title of the land is given to another party for various reasons by the contract or as security as commonly in the case of a charge created by the land owner upon the land to secure the repayment of loans. B

[15] There may be different grounds that a nonlandowner may acquire and claim the right to custody and possession of the documents. In the case of conflicting claims between parties, the determination or adjudication as to whom has the better right of the custody and possession thereto depends on facts and law resolution of which may require the calling of witness for production of evidence. C D

[16] In such circumstances, the conflicting claims of the parties could not be properly determined under s 120 of the Land Ordinance (Sabah Cap 68) purely based on the materials presented for the application thereunder. E

[17] Such conflicting claims of the parties should be determined and adjudicated in ordinary way by the court first before the deputy director should take upon himself/herself to adjudicate as to which party has a better right of custody and possession to the documents of title concerned for the replacement and certified document of title to be issued even if the fact that the document of title was lost or destroyed was established. F

[18] As to the power of the deputy director to order a holder of the document of title to deliver it up, s 121 provides that: G

> 121 Delivery of titles for cancellation or endorsement
>
> (1) When any document of title or extract from the Register *is cancelled or is forfeited or expires or is superseded or is required for the purpose of correcting any error or of endorsing any memorial thereon*, the Collector may by a notice in the form of Schedule XXV served on the holder thereof require him to deliver up such document, and the holder shall thereupon be legally bound so to deliver it. Penalty for-non-delivery H
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> (2) If default be made in delivering up any document of title required to be delivered up under subsection (1) the Collector may impose a penalty not exceeding one thousand ringgit which penalty shall be recoverable in the manner prescribed in Part VII, and may further with the sanction of the Director declare that such title has been cancelled by the Government, and thereupon all rights and interests thereunder shall cease. I

(3) Where a document of title has been cancelled under subsection (2), the Collector may issue a certified copy of such title for the purpose of correcting the error or endorsing the memorial thereon, and thereafter deliver it to the person entitled to the custody thereof, and such certified copy shall be available for all purposes and uses for which the original document of title so cancelled would have been available, and as valid to all intents as such title.

[19] Though, s 121 of the Land Ordinance (Cap 68) reads with the definition of 'Director' under ss 4 and 47(3) thereunder, empowers the deputy director to require the holder of any title document to deliver it up, such power can only be exercised 'when any document of title or extract from the register is cancelled or is forfeited or expires or is superseded or is required for the purpose of correcting any error or of endorsing any memorial thereon' as provided therein. Such power can only be exercised by the issuance of the notice in the form as prescribed under s 121(1) of the Land Ordinance (Sabah Cap 68).

[20] In summary, such power to issue the notice under s 121(1) of the Land Ordinance (Sabah Cap 68) can only be exercised when there was cancellation, rectification or correction authorised to be made to the register under the Land Ordinance (Cap 68), eg, ss 117, 118, 49(2), 68, 38 and 147 of the Land Ordinance (Sabah Cap 68).

[21] The matter before the deputy director by the application of the respondent was not concerning cancellation, rectification or correction authorised to be made to the register under s 121 of the Land Ordinance (Sabah Cap 68) in respect of the 13 documents of title but an application under s 120 for replacement or issuance of certified documents of title because they were said to be lost or destroyed.

[22] Section 121 cannot be invoked in an application by the respondent under s 120 of the Land Ordinance (Sabah Cap 68) so as to enable the deputy director to assume the power to adjudicate on the conflicting claims between the respondent and appellant to the right to the custody and possession of or to hold the 13 documents of the title or the legal custodian thereof and to assume the power to order the delivery of the documents of title to the party which the deputy director thought to be legally entitled to hold the same solely based on the materials before him in the application, when the undisputed evidence is that these documents of title were not lost or destroyed at all.

[23] Further, s 121 of the Land Ordinance (Cap 68) only empowers the deputy director to issue notice to require the title documents to be delivered up to the deputy director himself for the purposes as stated thereunder and not to

order the title documents of the land to be delivered by the holder to some other persons between whom the deputy director purportedly determined the issues of their disputes.

[24] The office of the deputy director is a creation of Land Ordinance (Sabah Cap 68). The deputy director has only so much powers as may be conferred by the provision of the Land Ordinance (Cap 68).

[25] There is no provision in the Land Ordinance (Cap 68) which empowers or gives the deputy director the jurisdiction or powers to adjudicate on the conflicting claims between parties to the legal right to the custody or possession of or to hold the title documents to land.

[26] In *Heller v British Columbia (Registrar Land Registration District Vancouver)* [1963] SCR 229, s 256 of the Land Registry Act empowered the registrar to cancel the registration, instrument, entry, memorandum or endorsement or correct the error in the register or instrument or any entry memorandum or endorsement made thereon or in any copy of any instrument made in or issued from the Land Registry Office if it appeared to the registrar, inter alia, 'that any registration instrument entry memorandum or endorsement was fraudulently or wrongfully obtained'. The question is whether the registrar should make a determination whether a conveyance was fraudulently or wrongfully obtained for the purpose of an application to cancel its registration and made the necessary correction to the register. In construing the power conferred upon the registrar under the provision, Martland J held at pp 234 and 235 that:

> In the second place his powers are limited by the words 'so far as practicable without prejudicing rights conferred for value'. Although it appears that the consideration stated in the conveyance from the appellant to the respondent was the sum of $1, the Registrar would not without receiving additional evidence be in position to know merely by looking at the conveyance itself whether the rights conferred upon the respondent by the conveyance were for value or not. *In my opinion it is no part of the function of Registrar under this section to adjudicate upon contested rights of parties for the determination of which it would be necessary for him to hear receive and weigh evidence.* He can only act upon the material which is before him in his own records
>
> I realize that the provisions of para of 256 may appear to be inconsistent with this conclusion That paragraph relates to situation where 'any registration instrument entry memorandum or endorsement was fraudulently or wrongfully obtained'. *If, however, these words were to be construed in their widest sense, so as to enable Registrar to act, under the section, upon evidence submitted to him upon which he could make finding of fraud, I would have grave doubts as to whether this provision could be held to be intra vires of the Legislature of British Columbia*. So construed the Registrar would be clothed with an original jurisdiction to determine questions of title to land in relation to which fraud had been alleged (Attorney General for Ontario and Display

Service Co Ltd Victoria Medical Building Ltd et al 1).

[27] In *In re Macarthy and Collins* (1901) 19 NZLR 545, a strip of land along the boundary of two adjoining parcels of land have been included in the certificates of title for both parcels. The District Land Registrar required the registered proprietors for both parcels of land to deliver up their certificates for correction under s 69 of the Land Transfer Act 1885, New Zealand. One of the registered proprietors refused to do so on the grounds that he was a registered bona fide for valuable consideration under a certificate of title prior in date to that of the adjoining proprietor, and that the occupation of the part proposed to be omitted from his certificate, by predecessors in title of the adjoining proprietor, had not been adverse to him but under him. The New Zealand Supreme Court held that the case was not one in which the registrar should attempt to deal with the matter under the provisions empowering the registrar to require the registered proprietors to deliver up the certificates of title of correction. Edward J held at pp 549–550 that:

> It is obvious that it is impossible for me upon this application to try the merits of the respective claims of Mr Collins and of Mr Macarthy to the strip of land, which appears to be included in the certificate of title of each of them. *It is equally obvious that the statute does not contemplate that questions of this description shall be determined upon such an application as the present.* So much, indeed, is conceded by counsel for all the parties. *The District Land Registrar, however, claims* — and he is supported in his contention by counsel for Mr, Macarthy — *that he may, upon such evidence as he thinks fit, or, apparently, upon no evidence at all, but merely upon the allegation that it appears to his satisfaction that the certificate of title under which Mr Collins claims contains a misdescription of land or of boundaries, call in Mr Collins's certificate of title, and alter it by omitting therefrom part of the land comprised therein. He also claims that upon Mr Collins's refusal to deliver up his certificate of title for this purpose he is entitled to the assistance of this Court to compel such certificate of title to be so delivered up. In other words, the District Land Registrar claims that he may of his own motion deprive a registered proprietor of land included in his certificate of title, and that this Court must assist him in so doing, although he admits that this Court cannot determine the rights of the parties on this application, or otherwise than-after an exhaustive inquiry in a suit brought for that purpose. The bare statement of this contention is, in my opinion, its own effectual condemnation.* This Court is called upon under section 71 to order a certificate of title to be delivered up only in a case in which it shall seem proper. In the present case it does not seem to be to be proper that the District Land Registrar should attempt to deal with the matter in the manner which he proposes, nor does it seem to me to be proper that this Court should assist him in so doing. (Emphasis added.)

[28] In *Manahi Te Hiakai v District Land Registrar* (1909) 29 NZLR 130, the Supreme Court held that the procedure under the Land Transfer Act 1908 of calling upon the District Land Registrar to correct an error in the land register was not intended to be invoked in cases in which grave and complicated questions of law and fact arise. Where the right of the person

claiming the correction is not demonstrably plain, the appropriate proceeding to establish the error is an action. See also *Duthie v District Land Registrar At Wellington* (1911) 31 NZLR 245.

[29] The principles of law as propounded by the decisions of the cases mentioned apply in the application of ss 120 and 121 when there are conflicting claims by parties to the custody or possession of or to hold the documents of title and when it is not demonstrably plain and obvious as to whom is 'lawfully entitled to the custody' thereof.

[30] Thus, when there is objection to the application thereunder by reasons of conflicting claims of another party to the legal right to custody or possession or to hold the document of title, it is also wrong in law for the deputy director to adjudicate as to which party has a better legal right of possessions or custody thereto when it is not demonstrably plain and obvious that the applicant is legally or lawfully entitled thereto.

[31] Having found that the documents of title was not lost or destroyed upon the application in an inquiry under s 120 of the Land Ordinance (Sabah Cap 68), the deputy director ought to have dismissed the respondent's application in view of the objection by the appellant.

PRONOUNCEMENT AND ORDER

[32] For the reasons I have given, in view of the conflicting claims of the appellant thereto and particularly in the light of the decisions of the court in High Court Suits Nos S 22–03 of 1998, S 23–06 of 1998 and in Judicial Review No K25–24 of 2007, I hold that the deputy registrar erred in law in proceeding further in adjudicating that the respondent was the legal custodian of the documents of the title concerned and not the appellant.

[33] I hold that it is wrong in law for the deputy director to assume the power under s 121 of the Land Ordinance (Sabah Cap 68) in the application before him under s 120 of the Land Ordinance (Sabah Cap 68) and to further order the appellant to deliver the documents of title concerned to the respondent. There is no provision in the Land Ordinance (Cap 68) which empowers the deputy director to make the order as he did.

[34] In the premises, I allow the appellant's appeal herein (encl 1) and set aside the relevant part of the decision and order of the deputy director made on 19 January 2021 as applied for by the appellant. I order the respondent to pay the appellant costs in the sum of RM8,000 subject to and with allocator fee.

Appeal allowed.

Reported by Nabilah Syahida Abdullah Salleh